

# Prior performance

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- How do you use new powers to curtail bidders who have scored well on tender submissions but performed poorly on other contracts, without making this known?

➤ Reg 57 :

- Mandatory exclusions
- Discretionary exclusions
  - (c) Grave professional misconduct
  - (d) Sufficiently plausible indications – agreements aimed at distorting competition
  - (g) Significant and persistent deficiencies in performance of a substantive requirement under a prior contract – led to early termination, damages or other comparable sanctions
- Duration – 5 years (mandatory); 3 years (discretionary)
- Self-cleaning

(A few) key provisions:

- Excluding suppliers (sections 26 – 27)
- Excluding suppliers by ref to subcontractors (section 28)
- Meaning of excluded and excludable suppliers (section 57)
- Continuing or likely to occur again (section 58)
- Debarment and debarment list (sections 59 – 66)
- Mandatory exclusions (Schedule 6)
- Discretionary exclusions (Schedule 7)
- Exclusion from frameworks (section 48)
- Termination (section 78)

A (small amount of) guidance:

- Guidance: Exclusions
- Guidance: Debarment

Excluded and excludable suppliers (sections 26, 27 and 57):

- CA must disregard/exclude tender from excluded supplier
- CA may disregard/exclude tender from excludable supplier
  
- Definitions of excluded and excludable :
  - Exclusion applies to supplier (S) or an associated person (AP) and circumstances are continuing or likely to occur again
  - OR
  - S or AP is on the debarment list
  
- If AP, must give S reasonable opportunity to replace AP

- Circumstances continuing or likely to occur again (section 58): CA may have regard to:
  - (a) S, AP or connected person (CP) has taken circumstances seriously
  - (b) Steps S, AP or CP has taken to prevent the circumstances continuing or occurring again
  - (c) Commitments that such steps will be taken or provision of information / access to allow verification/monitoring of such steps
  - (d) Time elapsed
  - (e) Any other evidence, explanation or factor that the CA considers appropriate
  
- CA must give reasonable opportunity to make representations/provide evidence

- Schedule 6 (mandatory grounds):
  - Criminal offences (Part 1)
  - Other mandatory exclusion grounds (Part 2)

- Schedule 7 (discretionary exclusion grounds) including:
  - Professional misconduct (para 11)
    - Decision maker considers that S or CP has engaged in professional misconduct which brings into question S's integrity
    - Court, regulator or other authority has ruled that S or CP has engaged in professional misconduct
    - Professional misconduct includes dishonesty, impropriety, a serious breach of ethical or professional standards

- Breach of contract and poor performance
  - (1) S has breached a relevant contract and the breach was sufficiently serious
  - (2) A court has ruled that S has breached a relevant contract and the breach was sufficiently serious
  - (3) S has not performed a relevant contract to the regulated authority's satisfaction, was given proper opportunity to improve performance and failed to do so
  - (4) A CA has published information under section 71(5) in respect of S

- Sufficiently serious if it results in:
  - Termination or partial termination
  - The award of damages
  - A settlement agreement

## Section 71(5) (assessment of contract performance):

- CA must publish information within 30 days in the following circumstances:
  - S has breached a public contract and breach results in (i) termination or partial termination, (ii) award of damages or (iii) settlement agreement
  - CA considers that S (a) is not performing a public contract to its satisfaction, (b) has been given proper opportunity to improve performance and (c) has failed to do so

- Associated person (section 26(4)):  
A person that the S is relying on to satisfy the conditions of participation but not a guarantor
  
- Connected person (Schedule 6, para 45):
  - (a) A person with significant control
  - (b) A director or shadow director
  - (c) A parent undertaking or subsidiary undertaking
  - (d) A predecessor company
  - (e) Any other person reasonably considered to stand in an equivalent position to (a) – (d)
  - (f) Any person over which S has right to exercise or actually exercises significant influence or control

# Subcontractors (section 28)



- CA must request information about whether S intends to sub-contract and seek to determine whether any intended sub-contractor is on the debarment list
- Must exclude if excluded and may exclude if excludable (except if associated person)
- But must notify the S and give it the opportunity to find an alternative S with which to subcontract

# Debarment (sections 59 - 66)



- CA who disregards/excludes an excluded or excludable S must give notice to the relevant authority
- Authority may investigate and, if so, must publish a report
- Before adding to debarment list, must give 8 working days notice to S (debarment standstill period)
- S can apply for suspension of decision
- S can appeal the decision within 30 days – on basis of material mistake of law
- S can apply at any time for removal or revision of entry on debarment list

## Implied terms:

- Frameworks (section 48): CA may exclude excluded supplier or supplier which has become excludable since award of FW from participating in award of contracts under FW
  
- Public contracts (section 78): Termination grounds include:
  - S has since award of contract become an excluded or excludable supplier (including by reference to AP)
  - A supplier (other than AP) to which S is sub-contracting is excluded or excludable supplier

# The answer?



- Wider (and clearer?) powers to exclude
- Draconian power to add to debarment list
- But transparency is not dead!